SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

No. 1308

In the

Supreme Court of the United States

OCTOBER TERM, 1968

EDWARD DON & COMPANY, a corporation, IRENE K. DON, RICHARD DON and DANIEL DON,
Petitioners,

vs.

PEARL DON UFLAND, DAVID DON, JULIUS K. DON, SAM DON and MEYER DON,
Respondents.

On Petition for a Writ of Certiorari to
The Appellate Court of Illinois,
First Judicial District

REPLY TO RESPONDENTS' BRIEF

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The Scheffer Press, Inc.—ANdover 3-6850

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Respondents do not challenge, as they could not challenge, the basic proposition calling for certiorari in this case: that a change of issues by an appellate court without notice or opportunity for presenting evidence or hearing on the new issues constitutes a deprivation of due process of law. Respondents assert that because the subject matter of the lawsuit remained the same, *i.e.*, a

controversy over ownership of the stock certificates, there was no problem of the introduction of new issues. This argument underlines the need for reiteration and application by this Court of its basic doctrine, so that it is not obscured and evaded by verbalisms of the kind indulged in by the respondents and by silence and disregard by appellate courts as occurred in Illinois.

The facts on which petitioners rest their claim here may be simply reiterated. None of these facts is contradicted by the brief in opposition.

The litigation as framed by the parties and decided by the trial court involved one question: Were the stock certificates in question validly issued to the parties named therein or was the issuance of the certificates a sham, in which case they were to be treated as nullities? The trial court held that the certificates were sham and to be treated as nullities.

The Illinois Appellate Court, however, held that the certificates were not nullities, nor were they validly issued to the parties named therein as their own property, but rather that the parties receiving them were to hold them in trust for others. No pleading, brief, or argument of the parties went to the question of the existence of a trust, much less to the correlative question of beneficial interest. No evidence was adduced on either question. All for the obvious reason that the questions did not exist for purposes of the litigation until introduced by the Appellate Court. And it is for this reason that the judgment below falls afoul of this Court's frequent determinations that a litigant who gets neither notice nor opportunity for hearing on the central issue of a lawsuit is deprived of his constitutional rights to due process of law. For here, as distinguished from the case of *Butler*

Bros. v. *McColgan,* 315 U.S. 501 (1942), cited by respondents, it cannot be truthfully said that "Appellant had a full opportunity to be heard on the issues which it tendered."

Respondents' reliance upon Rule 366(a)(5) of the Rules of the Supreme Court of Illinois is ineffective. If that rule can be interpreted to permit a court of review to engage in innovative and surprising decisions that deprive a party of an opportunity to introduce evidence and be heard upon a new issue raised *sua sponte* by the court of review for the first time in its decision, then it is patently violative of due process under the decisions of this Court cited in our Petition for Certiorari. However, Rule 366(a)(5) of the Rules of the Supreme Court of Illinois cannot have the broad sweep, which respondents claim, for such construction would render the rule repugnant to due process requirements. As the Supreme Court of Illinois, itself, in discussing the rule, recognized in the very case respondents cite, *Hux* v. *Raben,* 38 Ill. 2d 223, 225 (1967):

> There are limitations. "[A]n appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial." (*Rentways, Inc.* v. *O'Neill Milk and Cream Co.,* (1955) 308 N.Y. 342, 126 N.E. 2d 271.) In exercising the power care should be taken that the litigants are not deprived of an opportunity to present argument. In the case before us the issue was one of law which involved no problem of proof, and the purchasers had an opportunity to file a petition for rehearing in the appellate court, but they did not do so.

In this case, the new issue decided by the Illinois Appellate Court, *sua sponte,* did involve a problem of proof.

Petitioners were deprived of an opportunity to offer both evidence and argument on that issue. Petitioners, unlike the appellant in *Hux,* duly filed a petition for rehearing in the Appellate Court as well as a subsequent petition for appeal in the Supreme Court of Illinois which preserved the due process point.

Respectfully submitted,

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